Supreme Court, U.S.
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No. 96-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GUY D. ADAMS, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A federal statute provides that any obligation containing a gold clause can be discharged on payment of whatever tender is legal at the time of payment. An amendment, 31 U.S.C. § 5118(d)(2), declares that this provision "does not apply to an obligation issued after October 27, 1977." In this case, a post-1977 indenture assumed a pre-1977 obligation containing a gold clause. The question is:

Is a post-1977 assumption an "obligation issued" after 1977 in which a gold clause is enforceable, as held by the Eighth Circuit in *Trostel* v. *American Life & Cas. Ins. Co.*, 92 F.3d 736 (1996), or the transfer of an existing, pre-1977 obligation in which a gold clause is not enforceable, as held by the Ninth Circuit in this case?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Guy D. Adams, Herb Bailey, Barnts Medical Specialties, Benefit Trust Life Insurance Co., Tom Bradley, Donald L. Brookhart, Central Life Assurance Co., Russell L. Clarke, D.M.N. Inc., Ray Eiford, A. Sherman Hill, Bryce A. James, Frank L. Jones, Alan Russell Kahn, Robert M. Keenholts, the Manhattan Life Insurance Co., Standard Insurance Co., Ellis R. Stanley, Trustmark Life Insurance Co., the Union Central Life Insurance Co., Irene E. Walters, Woodmen of the World Life Insurance Society, and John H. Zybura, for their own behalf and on behalf of and as Class Representatives of all other persons similarly situated, were the plaintiffs-appellants in the Court of Appeals. CSX Transportation, Inc. was the defendant-appellee.

Pursuant to Rule 29.6, petitioners note that Benefit Trust Life Insurance Co., Central Life Assurance Co., D.M.N. Inc., the Manhattan Life Insurance Co., Standard Insurance Co., and the Union Central Life Insurance Co. have no parent companies and no non-wholly owned subsidiaries. Petitioner Trustmark Life Insurance Co. is a wholly owned subsidiary of Trustmark Insurance Company.

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PETITION FOR A WRIT OF CERTIORARI

Guy D. Adams, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 80 F.3d 1377 and is reprinted in the appendix hereto ("App.") at 1a. The order of the United States District Court for the Western District of Washington is unreported and is reprinted at App. 16a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 10, 1996. App. 1a. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* on June 24, 1996. App. 23a. The jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291. On September 11, 1996, Justice O'Connor entered an order extending the time to petition for certiorari to and including October 22, 1996. App. 25a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Prior to September 30, 1996, Section 5118(d)(2) of Title 31, United States Code, provided: "An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977."

On September 30, 1996, Congress amended Section 5118(d)(2) by adding a sentence providing that, "This paragraph shall apply to any obligation issued on or before October 27, 1977, notwithstanding any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement. Nothing in the preceding sentence shall be construed to affect the enforceability of a Gold Clause contained in any obligation issued after October 27, 1977 if the enforceability of that Gold Clause has been finally adjudicated before the date of enactment of the Economic Growth and Regulatory Paperwork Reduction Act of 1996." Pub. L. No. 104-208, § 2609.

STATEMENT OF THE CASE

On March 1, 1899, the Hocking Valley Railway Company (Hocking Valley) issued a ninety-nine year bond containing a clause promising to repay the principal "in Gold Coin of the United States of the present standard of weight and fineness" and to pay the interest "in like gold coin" semiannually. App. 26a. At the time these bonds were issued, such gold clauses were commonly included in long-term obligations to protect creditors against inflation. *Norman* v. *Baltimore & O. R. Co.*, 294 U.S. 240, 313 (1935); *see also Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 271 (1984) (Stevens, J., dissenting) (noting that in 1934 "[t]he purpose and effect of gold clauses * * * were * * * well known in this country").[1]

The bonds were secured by a mortgage on all of Hocking Valley's assets. The mortgage explicitly provided that nothing therein prevented Hocking Valley from merging or consolidating with another company so long as the corporation formed by the consolidation or merger assumed payment of the principal and interest of the bonds "according to their tenor." App. 27a. When Hocking Valley sold its assets to the Chesapeake and Ohio Railway Company (C&O) in 1930, C&O complied with this requirement by issuing a supplement to the mortgage expressly assuming Hocking Valley's obligations under the bonds. App. 5a, 16a-17a, 28a; *see also Chesapeake & Ohio Ry. Co. Acquisition*, 162 I.C.C. 323 (1930).

Three years later, during the first 100 days of Franklin Roosevelt's presidency, the President and Congress took a series of steps to inflate domestic prices in an attempt

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[1] The bondholders' concerns about inflation were well founded. Bondholders of an 1881 bond that matured in 1995 were repaid in dollars that would have been worth less than seven cents at the time of the investment. Floyd Norris, *After 114 Years, It's Payday*, N.Y. Times, July 1, 1995, at 33.

to mitigate the effects of the Depression.[2] As part of this program, Congress in 1933 enacted a joint resolution declaring gold clauses to be against public policy and that, thereafter, obligations subject to gold clauses could be discharged by a dollar-for-dollar payment in any coin or currency that was legal tender at the time of payment. Joint Resolution of June 5, 1933, ch. 48, 48 Stat. 112, 113.[3] By 1977, the conditions that led to the enactment of the 1933 joint resolution were a distant memory. Calling the prohibition of gold clauses "anachronistic," Senator Jesse Helms introduced legislation providing that the 1933 joint resolution "shall not apply to obligations issued on or after the date of enactment of this section." 123 Cong. Rec. 634-635 (1977). This proposal was subsequently enacted on October 28, 1977. Pub. L. No. 95-147, § 4(c), 91 Stat. 1227, 1229 (1977) (codified at 31 U.S.C. § 5118(d)(2)).[4]

In 1987, C&O merged into CSX Transportation, Inc. (CSXT). App. 5a, 17a, 28a. Five years later, CSXT and the bond trustee signed a supplemental indenture in which CSXT expressly assumed the payment of the principal and interest of the Hocking Valley bonds

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[2] For a more complete description of the economic reforms enacted during the early stages of the Roosevelt Administration, see *Norman v. Baltimore & O. R. Co.*, 294 U.S. at 295-296; Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. Chi. L. Rev. 504, 508-514 (1984).

[3] In the years that followed, this Court rejected a wide range of constitutional challenges to the 1933 joint resolution. *Guaranty Trust Co. of New York* v. *Henwood*, 307 U.S. 247 (1939); *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U.S. 324 (1937); *Norman* v. *Baltimore & O. R. Co.*, *supra.*

[4] Congress recodified the 1933 joint resolution and the 1977 amendment into its present form in 1982. Pub. L. No. 97-258, sec. 1, § 5118(d)(2), 96 Stat. 979, 985 (1982). The legislative history indicates that Congress did not intend this recodification to effect any substantive changes to the statute. H.R. Rep. No. 651, 97th Cong., 2d Sess. 1-4 (1982).

"according to their tenor." App. 28a-29a. CSXT agreed to the supplemental indenture in order to "confirm to the Trustee that [CSXT] had assumed the due and punctual payment of the principal and interest of the Bonds issued under the Mortgage," and "in consideration of the premises and in fulfillment of its obligations under the Mortgage." App. 28a.

Shortly thereafter, a group of bondholders brought a class action suit seeking damages for CSXT's failure to make interest payments in gold subsequent to the date of the merger, as well as a declaratory judgment requiring CSXT to make future interest and principal payments in gold. The bondholders' sole contention was that the 1987 merger and the 1992 supplemental indenture constituted an "obligation issued after October 27, 1977" under 31 U.S.C. § 5118(d)(2), and that by promising to pay the principal and interest of the Hocking Valley bonds "according to their tenor," the supplemental indenture had incorporated by reference a promise to pay in gold. App. 19a-20a.

The District Court dismissed the action for failure to state a claim, holding that the gold clause in the bonds themselves was not enforceable. In the words of the District Court, "'Issue' means the first purchase of a bond. Each purchase of a bond is not an issuance." App. 20a. Although the District Court did alternatively consider whether a post-1977 assumption of an interest could constitute the issuance of an obligation under the 1977 amendment, the court concluded that, in this case, "[t]he 1987 merger and 1992 supplemental indenture agreement [did] not create a new agreement with the Bondholders so as to form a novation." App. 21a.

On appeal, the Hocking Valley bondholders again argued that the 1992 supplemental indenture was an obligation issued after 1977 and thus fell outside of Section 5118(d)(2)'s provision rendering gold clauses unenforceable. The Ninth Circuit affirmed. The opinion focused most of its attention on a similar case pending

against the Burlington Northern Railroad Company that the court had consolidated with this case on appeal, and devoted only three paragraphs to the claims of the Hocking Valley bondholders. According to the court, CSXT's agreement to assume the Hocking Valley bond payments did not constitute an obligation issued after 1977. The only "issuance" of the Hocking Valley bonds occurred when the bonds were first sold in 1899, and "[t]hese original debt obligations continued, and were assumed in their entirety, by CSXT." App. 14a. Since "[n]o new debt was created," the Ninth Circuit concluded that "the only relevant 'obligation' for purposes of the 1977 Amendment was that which arose upon the [original] issuance of the Hocking Valley bonds." App. 14a.

In their timely petition for rehearing and suggestion for rehearing *en banc*, the Hocking Valley bondholders again pressed their argument that the supplemental indenture in and of itself stated a new obligation containing an enforceable gold clause. The bondholders also pointed out several distinctions between the CSXT and Burlington Northern cases. In particular, the bondholders emphasized that the key transactions involved in the Burlington Northern case were nothing more than changes in the security of the bonds and, in one case, a reorganization that merely changed the name of the obligor corporation. Given that none of these transactions ever placed any duties on a new party, it would be hard to characterize such adjustments as the issuance of a new obligation. In the CSXT merger, however, a third-party previously uninvolved in the Hocking Valley bonds clearly undertook new duties -- a situation that can only be characterized as the issuance of a new obligation. The Ninth Circuit denied the petition for rehearing on June 24, 1996. App. 23a.[5]

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[5] The Burlington Northern bondholders sought certiorari in this Court, which was denied. *Adams* v. *Burlington N. R.R. Co.*, 65 U.S.L.W. 3084 (U.S. Oct. 7, 1996) (No. 96-51). That petition,

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE EIGHTH CIRCUIT HOLDING THAT THE ASSUMPTION OF PRE-EXISTING RIGHTS AND DUTIES MAY CONSTITUTE THE ISSUANCE OF A NEW OBLIGATION UNDER 31 U.S.C. § 5118(d)(2).

This Court should grant certiorari to resolve the conflict between the decision below and the recent decision in *Trostel* v. *American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996), in which the Eighth Circuit embraced the very principle that the Ninth Circuit rejected. The dispute in *Trostel* stemmed from a ninety-nine year commercial lease signed in 1917. Because of the length of the leasehold, the original lease contained a gold clause. The lease also specifically gave the tenant the option of transferring or assigning its interest in the lease to a new tenant, in which case the transferring tenant would be relieved from further liability. *Id.* at 738. In 1990, after several transfers of the lease and several non-germane amendments to its terms, a new tenant assumed the leasehold, explicitly agreeing to be bound by all of the terms and conditions of the original 1917 lease. *Id.* at 739-740.

The Eighth Circuit concluded that "[i]f the 1990 transfer of interest created a new obligation between [the parties], it could legally contain a gold clause because it took place after the time that gold clauses were prohibited." *Id.* at 740. Since a new obligation could be created by a novation of the lease, and the transaction in question met all of the requisites for a novation under Iowa law, the court held that "the parties were legally free to incorporate a gold clause into the lease agreement

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however, presented questions distinct from the one presented here, including whether a change in security interest constituted the issuance of a new obligation under the 1977 amendment and whether the 1933 joint resolution was constitutional.

at that time." *Id.* at 741. And there was no question that "[o]n its face the 1990 warranty agreement clearly incorporated all of the terms of the 1917 lease," including the gold clause. *Id.* at 740.

It did not matter that the gold clause incorporated by reference was itself unenforceable. As the Eighth Circuit reasoned, "Nothing in the terms of the 1933 act suggests that an existing gold clause would be 'erased' or eliminated from the lease." *Id.* at 741. Instead, the statute simply rendered the gold clause unenforceable. If Congress had intended the 1933 joint resolution to cause all gold clauses to disappear, there would have been no reason for it to apply the right to discharge by legal tender to "[e]very obligation, heretofore *or hereafter* incurred." *Id.* at 742 (quoting the statutory language from 1933) (emphasis added). Therefore, the court concluded, "The 1933 act did not magically erase the gold clause from the 1917 lease. Although it rendered the clause unenforceable, there is no reason that it could not be incorporated by reference in a new lease obligation entered into in 1990." *Id.* Since the 1990 warranty agreement unambiguously bound the new tenant to the terms of the original 1917 lease, the court had no choice but to enforce the contract terms as written and require that the new tenant pay the rent in gold. *Id.* at 743.[6]

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[6] *Trostel* was just the most recent in a line of cases recognizing that transfers of existing interests may constitute new obligations under 31 U.S.C. § 5118(d)(2). The court in *Wells Fargo Bank* v. *Bank of America*, 32 Cal. App. 4th 424, 435, 38 Cal. Rptr. 2d 521, 527 (1995), similarly ruled that "subsequent actions of the parties to a contract, including successors in interest, can amount to * * * a new obligation within the meaning of the 1977 amendment." Similarly, in *Fay Corp.* v. *BAT Holdings I, Inc.*, 646 F. Supp. 946, 952 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp.* v. *Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990), the court acknowledged that if a transfer of an interest represented a new contractual obligation after 1977, any gold clauses appearing in that new contract would be enforceable.

The parallels between the facts in this case and the facts in *Trostel* are striking. In each case, the instrument creating the original interest contained a gold clause. Each instrument also contained a provision expressly permitting the transfer of the rights and duties created by the instrument to a third person. Furthermore, in both cases the rights and duties were indeed transferred after 1977 to a third party who, in assuming these rights and duties, incorporated the terms of the original instrument by reference, expressly agreeing to be bound by the terms of the original instrument.[7] And yet, when faced with almost identical facts, the two courts came to precisely opposite conclusions as to the enforceability of the gold clauses.

Such a conflict should not be tolerated. Allowing both of these decisions to stand would give the prevailing parties in these disputes nearly a twenty-fold windfall and would impose an equivalent penalty upon the opposing parties, even though the opposite result would have obtained had their respective cases arisen in the other Circuit. *See* App. 4a; Dan Piller, *Supreme Court Gives BNSF Golden Ruling*, Fort Worth Star-Telegram, Oct. 8, 1996, at 1; *Railroad Wins Golden Ruling*, Tulsa World, Oct. 8, 1996, at E6. Moreover, unless this Court resolves the conflict, such inequities are likely to recur. In 1976, the value of railroad bonds listed on the New York Stock Exchange that were subject to gold clauses was estimated to be $300 million. *The Gold Bonanza That's Up to the Courts*, Business Week, Jan. 12, 1976,

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Counsel for the appellee in *Trostel* has advised that the appellee will file a petition for certiorari with this Court seeking review of the Eighth Circuit's decision. We respectfully suggest that the *Trostel* petition and this petition be considered together.

[7] As Judge Learned Hand noted in *Eddy* v. *Prudence Bonds Corp.*, 165 F.2d 157 (2d Cir. 1947), *cert. denied*, 333 U.S. 845 (1948), the phrase "according to their tenor" was generally understood to mean "that the letter of the instrument itself should be followed." *Id.* at 162; *accord Black's Law Dictionary* 1469 (6th ed. 1990).

at 66. When all industries and all exchanges were considered, the estimate increased to $1 billion. Michael Kolbenschlag, *Turning Paper into Gold*, Forbes, Mar. 3, 1980, at 88.[8] Moreover, the stakes will continue to rise over the next several years as the many ninety-nine year mortgage bonds issued around of the turn of the century mature, and the railroads become obligated to repay the principal in addition to the interest. *Id.* Therefore, this Court should grant certiorari to resolve the conflict between this case and the Eighth Circuit's decision in *Trostel* and to clarify the application of 31 U.S.C. § 5118(d)(2).

II. THE CONCLUSION BELOW THAT AN ASSUMPTION OF ANOTHER CORPORATION'S DUTIES UNDER A BOND CAN NEVER CONSTITUTE AN OBLIGATION ISSUED AFTER 1977 CONFLICTS WITH THE STATUTE AND THIS COURT'S PRECEDENTS.

Given the conflict between the decision below and the previously unbroken line of precedent, it should come as no surprise that the Ninth Circuit's conclusion is inconsistent with the language of the statute as

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[8] The magnitude of the potential problem should come as no surprise. The Government estimated that gold clauses were included in fifty-five percent of a wide range of long-term obligations in 1932. Brief for the United States and the Reconstruction Finance Corporation at 35 n.14, *United States* v. *Bankers Trust Co.*, 294 U.S. 240 (1935) (Nos. 471, 472), *cited in* Dam, 50 U. Chi. L. Rev. at 523 & n.115. Estimates of the total indebtedness subject to gold clauses in the mid-1930s range from $75-150 billion. *Norman* v. *Baltimore & O. R. Co.*, 294 U.S. at 313 (noting that government estimated gold clause obligations at $75 billion); John Hanna, *Currency Control and Private Property*, 33 Colum. L. Rev. 617, 633 (1933) (noting that $124 billion in contracts contain gold clauses); Arthur Nussbaum, *A History of the Dollar* 188 (1957) (noting that estimates of obligations subject to gold clauses ranged from $75 to 123 billion); Michael Kolbenschlag, *Turning Paper into Gold*, Forbes, Mar. 3, 1980, at 88 (estimating that $150 billion in bonds were subject to gold clauses in the 1930s).

interpreted by this Court. A close reading of the portion of the opinion dealing with the Burlington Northern case reveals the crux of the Ninth Circuit's opinion. In that court's words, "Whatever may be the rule regarding transfer of leases, bonds must continue to be viewed as issued on the date of first issue." App. 12a.

No principle of statutory construction supports the conclusion that an agreement to assume a bond obligation cannot constitute an "obligation issued" after 1977. The dictionary defines an "obligation," in relevant part, as "something (as a promise, vow, or demand of conscience) that binds or constrains to a course of action" or, alternatively, as "a formal and binding agreement or acknowledgment of a liability to pay a specified sum or do a specified thing." 2 *Webster's Third New International Dictionary* 1556 (1986); *see also Edwards* v. *Kearzey*, 96 U.S. (6 Otto) 595, 600 (1878) (noting that *Webster's Dictionary* defines "obligation" as "the binding power of a vow, promise, oath, or contract"). Clearly, construed according to its ordinary meaning, the term "obligation" is broad enough to encompass an agreement to assume another corporation's bond payments.

Section 5118(d)(1) itself defines "obligation" as "any obligation (except United States currency) payable in United States money." The fact that this definition is somewhat circular -- defining "obligation" in terms of "any obligation" -- limits its usefulness, but certain aspects of the definition do lend support to a broad construction of the term. The statute places only two limits on what may constitute an obligation -- (1) that it not be United States currency, and (2) that it must be payable in United States money -- and neither supports distinguishing between agreements that create interests and agreements that transfer interests. In fact, under the familiar principle of *expressio unius exclusio alterius*, the absence of any other qualifications suggests the contrary. As the court pointed out in *Wells Fargo Bank*

v. *Bank of America*, 32 Cal. App. 4th at 435-436, 38 Cal. Rptr. 2d at 528, "If Congress * * * had intended to restrict the 1977 amendment only to an original contract involving the original parties and not to a novation amounting to a new obligation with, as here, successor parties, such narrowing language could have been used in the amendment. As worded, the 1977 amendment is applicable to the general contract law of novation, and there is no indication that Congress intended otherwise."

A subsequent congressional enactment has corroborated this analysis. In 1996, Congress again amended Section 5118(d)(2) to insert precisely the type of limitation that the *Wells Fargo* court believed would be necessary to take assignments of existing rights and duties outside the scope of the 1977 amendment. Specifically, the 1996 amendment provided that the 1977 amendment not apply to "any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement." Pub. L. No. 104-208, § 2609. Had the Ninth Circuit's reasoning in this case been sound, no such clarifying amendment would have been necessary, since assignments of existing debts could never constitute an "obligation issued" after 1977. Given that courts generally avoid constructions that treat specific Acts of Congress as mere nullities, *see, e.g.*, *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 69 (1984), the fact that Congress saw fit to enact the 1996 amendment clearly undercuts the basis for the decision of the court below.[9]

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[9] A later clause of the 1996 amendment provided that nothing in the amendment "shall be construed to affect the enforceability of a Gold Clause contained in any obligation issued after October 27, 1977 if the enforceability of that Gold Clause has been finally adjudicated before the date of enactment of [this act]." Pub. L. No. 104-208, § 2609. In light of this additional clause, it is unclear whether the 1996 amendment applies to this case. The phrase "finally adjudicated" is ambiguous, particularly in a case such as this in which a final judgment has been entered, but the

Furthermore, the broad manner in which this Court has construed the term "obligation" in the 1933 joint resolution implicitly undermines the Ninth Circuit's distinction between agreements to assign leases and agreements to assign rights and duties under a bond.[10]

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possibility of Supreme Court review remains. In addition, even if the 1996 amendment does apply, the gold clause in this case would still be enforceable because the particular circumstances of this case satisfy the amendment's requirement that all of the parties specifically agree to the inclusion of the gold clause in the new agreement. Finally, if the 1996 amendment does apply and renders the gold clause unenforceable, it is not clear that the 1996 amendment would be constitutional. *See, e.g., National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 476-477 (1985) (congressional enactment may violate the Due Process Clause if it altered contractual rights in an arbitrary or irrational manner). Should this Court be inclined to grant this petition to address the conflict between this case and *Trostel*, there would be time enough to address these issues on remand after this Court resolves the conflict.

[10] Like Section 5118, the scope of the original 1933 joint resolution was determined by the scope of the term "obligation." The original statute provided:

> [E]very provision contained in or made with respect to any *obligation* which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision contained in or made with respect to any *obligation* hereafter incurred. Every *obligation*, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect hereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision in any law authorizing *obligations* to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

48 Stat. at 113 (emphasis added). The definition of "obligation" in the 1933 joint resolution was also similar to the definition in Section 5118(d), providing that "[a]s used in this resolution, the term 'obligation' means an obligation (including obligation of and

Although it has never directly addressed the proper construction of "obligation," this Court applied the 1933 joint resolution to railroad bonds, *Norman* v. *Baltimore & O. R. Co.*, *supra*; *Guaranty Trust Co. of New York* v. *Henwood*, *supra*, and leases, *Holyoke Water Power Co.* v. *American Writing Paper Co.*, *supra*, as well as treasury certificates, *Nortz* v. *United States*, 294 U.S. 317 (1935), and liberty bonds, *Perry* v. *United States*, 294 U.S. 330 (1935), without ever suggesting that any particular type of interest or undertaking would fall outside the statutory definition of an "obligation." Since the whole purpose of the 1977 amendment was to carve out a specific exception to the 1933 joint resolution, and since both the 1933 joint resolution and the 1977 amendment used "obligation" in the same manner, it is only natural that the term be given the same construction in each context. In distinguishing between assignments of duties under leases and bonds, the court below somewhat irrationally construed the terms of the 1977 amendment in a manner inconsistent with this Court's construction of the statute being amended.

The court below chose to ignore these basic principles of statutory construction. Instead, it differentiated between the assignment of lease interests and the assignment of bond interests primarily because of policy concerns. As the court reasoned, "Bonds are regularly sold and purchased in large, impersonal markets, * * * while leaseholds generally involve a small number of readily ascertainable and stable parties who can engage in the type of bargaining and mutual consent necessary for a novation." App. 12a. This reasoning might have had some relevance had the Hocking Valley bondholders brought their action on the bonds themselves. But the bondholders based their claim on CSXT's express agreement to assume C&O's payments under the bonds. Agreements to assume interests are conceptually distinct

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to the United States, excepting currency) payable in money of the United States." *Id.*

from the underlying interests. As the court reasoned in *Fay Corp.* v. *BAT Holdings I, Inc.*, 646 F. Supp. at 949 n.7, an agreement to assume an interest is "a new obligation unto itself," separate and apart from the pre-existing obligation being assumed. To say that the bonds were not an obligation issued after 1977 says nothing about the status of CSXT's post-1977 agreement to assume the bond payments.[11] Even setting aside the Ninth Circuit's mischaracterization of this case, this Court has already rejected the argument that the fact that a particular type of instrument may be relatively rare or relatively common justifies treating that type of instrument any differently under Section 5118(d)(2). *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U.S. at 340-341. It is for Congress to weigh the impact of the different types of interests, not the courts.

Had the Ninth Circuit correctly construed Section 5118(d)(2) as applying to all transfers of existing interests, it would have had no choice but to conclude that CSXT's assumption of C&O's obligations met the requirements for the issuance of a new obligation. No one disputes that CSXT's assumption of the payments under the Hocking Valley bonds represents a binding obligation on CSXT that it did not possess before. Arising as it did after 1977, the gold clause contained in that obligation by reference should have been enforceable.[12]

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[11] The Ninth Circuit made the same mistake when it reasoned that "[i]f * * * the merger of the obligor with an agreement to honor outstanding bonds, were to effectuate a new issue of the bonds, the prospective nature of the 1977 amendment would be almost entirely defeated in the major area of corporate bonds." App. 12a. Again, agreements to transfer interests can be obligations separate and apart from the interest being transferred. Acknowledging that a post-1977 assignment of an interest may constitute the issuance of an obligation in no way gives any retrospective effect to the 1977 amendment.

[12] The court below did spend one footnote addressing whether the assumption of bond payments in the Burlington Northern case

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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met the requisites for the issuance of a new obligation. App. 13a n.4. As the Hocking Valley bondholders pointed out in their petition for rehearing, the Burlington Northern case involved changes in the security interests of the bonds and a reorganization that merely changed the name of the obligor. It would be hard to characterize such adjustments as the issuance of a new obligation. The CSXT merger, however, presents a situation that can only be characterized as the issuance of a new obligation, in that a third party previously uninvolved in the Hocking Valley bonds undertook new duties.